In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1650

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, An Association,

Petitioner,

v.

DAVID ANDERSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent, David Anderson, herein called "Anderson", hereby files his opposition to granting the Petition for Writ of Certiorari in the above-captioned matter of the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, herein called "IAM".[1]

[1] The style in the Petition for Writ of Certiorari was printed to carry forward all parties below. However, only counsel for IAM has perfected a Petition for Certiorari. See, JURISDICTION.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 589 F2d 397. The opinion of the United States District Court for the Southern District of California is reported at 430 F.Supp. 418. Both Opinions, along with the Judgment of the District Court, are reproduced in the Appendix of the Petition for Cert., A-1 thru A-10 and B-1 thru B-9. The opinion of the companion case, *Burns v. Southern Pacific Transportation Company, et al* is reported at 589 F2d 403, cert. den'd. sub nom. *Southern Pacific Transportation Company, et al v. Burns,* ____ U.S. ____, 59 L.Ed.2d [illegible] (1979).

JURISDICTION

The Court of Appeals entered judgment on September 7, 1978. The IAM applied for an extension of time to file a Petition for Rehearing and Rehearing In Banc which was granted. Thereafter, the IAM, but not General Dynamics, timely filed its Petition for Rehearing and Rehearing In Banc which was denied on January 16, 1979, and a Petition for Certiorari was filed by the IAM within 90 days of that date. The jurisdiction of this Court is properly conferred, as to the IAM only, under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the IAM carry its burden of proof to show a reasonable accommodation to this employee's religious beliefs could not be made without undue hardship?

2. Did the IAM properly preserve its attack on the constitutionality of § 701(j) of the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e(j)); and, if so, does the statutory duty of reasonable accommodation on the IAM violate the

Establishment Clause of the First Amendment to the Constitution?

STATUTORY PROVISIONS INVOLVED

The relevant provisions of 29 U.S.C. § 158(a)(3) are set forth in the Petition for Cert. (Pet. 3).

The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, et seq., provides in relevant part as follows —

Section 701(j) states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 703(a) states in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> (1) . . . otherwise to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . religion . . .; or
>
> (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . .

Section 703(c) states in pertinent part:

> (c) It shall be an unlawful employment practice for a labor organization —
>
> (1) . . . otherwise to discriminate against any individual because of his . . . religion . . .; or
>
> (2) to limit, segregate, or classify its membership . . . in

any way which would deprive or tend to deprive any individual of employment opportunities, or . . . otherwise adversely affect his status as an employee . . . because of such individual's . . . religion . . .; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

COUNTER-STATEMENT OF THE CASE

Anderson has been an employee of General Dynamics Convair Aerospace Division since October 11, 1956. He was discharged June 16, 1972, after almost 16 years of service, at the request of the IAM. For many years, the IAM has represented a bargaining unit of which Anderson is a member. Between 1959 and 1972 General Dynamics and IAM had in effect a collective bargaining agreement concerning the wages, hours and working conditions of employees similarly situated as Anderson.

In 1972, General Dynamics and the IAM agreed to a union security clause providing that all employees in Anderson's collective bargaining unit must, as a condition of continued employment, join the union within 10 days after the 30th day following the effective day of the collective bargaining agreement. This agreement became effective April 3, 1972, but as of June 14, 1972 Anderson had not become a member of the IAM. Anderson's termination was requested by the Union on June 14, 1972, and effectuated by the Company two days hence for failure to become a member of or pay monies to the IAM. Anderson's termination resulted solely from his refusal to become a member of or contribute monies to the IAM.

Since 1959, Anderson has also been a member of the Seventh-Day Adventist Church. He subscribes to the Church's teaching against joining or contributing monies to a labor organization.

The Seventh-Day Adventist Church teaches its members that to join or contribute monies to a labor organization violates the principles and tenets of the Bible as interpreted by the Church. However, the decision not to join and/or support a labor union is a growth process left to the individual conscience of each member. A Seventh-Day Adventist who does not understand the teachings of the Church regarding labor unions will not be disfellowshipped for an association, but once an Adventist understands those teachings, he places his eternal salvation in jeopardy by contributing monies to a union.

Previous to his discharge, neither the IAM nor General Dynamics offered Anderson any alternatives or accommodations with respect to his religious beliefs. Anderson was advised only that he was required to subscribe to the union security agreement between General Dynamics and the IAM or be fired. The Church forbids its members from joining or financially supporting any union based on its interpretation of the Bible, Spirit of Prophecy, Law of God, and Baptismal Vows. Anderson sincerely believes individually the teachings of the Church, and construes literally the teachings of the Seventh-Day Adventist. Anderson has offered to pay the equivalent of the union dues and assessments to a designated charity, but he is not willing to pay the monies through the union. He is prepared to offer proof to the Union of the charity payments.

In response to the foregoing, Anderson requested an accommodation of his religious beliefs be made by allowing him to pay the equivalency of union dues to an agreed upon charity (a form of accommodation which has been coined "charity-substitution"). Failing to secure the request and accommodation, he was fired on June 16, 1972. Thereafter, Anderson filed

charges with the Equal Employment Opportunity Commission on September 27, 1972. On November 6, 1972, the EEOC referred the Complaint to the California Fair Employment Practice Commission, the appropriate state agency regulating employment practices. The state agency, in turn, referred the matter back to the jurisdiction of the EEOC on December 6, 1972, and on April 2, 1974, a decision was entered finding reasonable cause to believe that the IAM had violated Anderson's statutory rights under Title VII. Thereafter, Anderson timely filed suit in the United States District Court for the Southern District of California sitting in San Diego, California on October 3, 1975.

On October 16, 1975, Anderson filed his First Amended Complaint seeking reinstatement, back pay, attorney's fees, and injunctive relief against General Dynamics and the IAM. The case was tried before the court without a jury, resulting in a judgment against him, and Anderson appealed to the Ninth Circuit Court of Appeals.

On appeal before the Ninth Circuit, the Court held that Anderson, to establish a *prima facie* case of discrimination under Title VII, must plead and prove: (1) he had a bona fide belief that payment of union dues was contrary to his religious faith; (2) inform the IAM that his religious views were in conflict with the union security agreement; and (3) he was discharged for his refusal to join or pay monies to the IAM. The case at the trial court proceeded to trial only after extensive stipulations were reached by the parties and approved by the court. The Ninth Circuit held that Anderson, both by stipulation of fact and presentation of evidence, had established his *prima facie* case. Thereafter, the court held the burden was on

the IAM to prove that it could not accommodate Anderson's religious beliefs without undue hardship. The appellate court held that the parties had stipulated as to the sincerity of Anderson's religious beliefs, and approved the findings by the trial court that these beliefs were the basis of his refusal to pay dues to the union and the result of his discharge. The court further held that the IAM had only obliquely raised its attack on the constitutionality of 701(j), and, thus, declined to reach any constitutional question.

The Union on appeal urged affirmance on the finding by the trial court that Anderson's refusal to pay the equivalent of union dues to a charity, to the union for distribution, was based on distrust of unions in general. The circuit court dealt squarely and directly with this contention, as well as the other arguments of the IAM, and held that the IAM had not carried its burden to accommodate or to demonstrate undue hardship. In reversing the district court, the appellate court found the IAM had made no effort to accommodate Anderson's particular religious beliefs. Further, the Ninth Circuit rejected the argument that failure of charity-substitution payments, to the union, for charitable purposes was an undue hardship as a matter of law. Finally, the Court held that the evidence offered did not demonstrate that undue hardship under the facts in this case, in fact, existed.

Thus, the IAM seeks certiorari on the very limited issues of (1) whether they carried their burden of proof that undue hardship in fact existed despite their admitted failure to offer any accommodation; or (2) whether the statutory duty of reasonable accommodation on the IAM violates the Establishment Clause of the First Amendment to the Constitution.

ARGUMENTS GRANTING THE WRIT

I. ***No conflict exists between the Ninth Circuit Court of Appeals and the Supreme Court, or among the circuit courts, that the Union has the burden to attempt accommodation unless they demonstrate undue hardship.***

A.

The Ninth Circuit correctly held that the IAM failed to carry its burden of proof.

The Petitioner suggests on Page 18 of its Brief that the state of the law is uncertain and the unions do not know their duties under Title VII. The IAM says the holding by the Ninth Circuit in the instant case runs afoul of the teachings of *Trans World Airlines v. Hardison* 432 U.S. 63 (1977). The IAM says, finally, the Ninth Circuit did not understand its own teachings in *Yott v. North American Rockwell* 501 F.2d 398 (CA 9, 1974), or *Burns v. Southern Pacific Transportation Company, et al* 589 F.2d 403 (CA 9, 1978) cert. den'd. (78-706) sub nom. *Southern Pacific Transportation Company, et al v. Burns* ____ U.S. ____; 59 L.Ed.2d 38, 99 Sup. Ct. 843 (1979).

The Ninth Circuit in the instant case necessarily found that the IAM failed to carry its burden of proof. This holding was consistent not only with its other holdings, but consistent with every circuit court to write on the subject.

[1] Interpreting 29 CFR 1605.1, the genesis to 701(j), in 1974, the Ninth Circuit said:

> "Thus we agree with *Reid* and find that accommodation is required . . If appellees are able to demonstrate that any suggested accommodation would impose undue hardship . . . . *Yott* 501 F.2d at 403."

Interpreting the burden under 701(j), in the instant case, the Ninth Circuit said:

> "The burden was thereafter on General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs, and if those efforts were unsuccessful, to demonstrate that they were unable to reasonably accommodate his beliefs without undue hardship." (citations omitted) 589 F.2d at 401. . . . Appellees can take no comfort from the observation in *Yott v. North American Rockwell Corp., supra,* 501 F.2d 403 "if Appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or the employer's business, then Yott's discrimination claim should fail". We reversed in *Yott* because the Appellee had not demonstrated that the suggested accommodation would impose undue hardship, and, as we have explained to the Appellees in this case (meaning *Anderson*) have not done so either." 589 F.2d at 402, n. 4.

Interpreting the burden in *Burns,* the Ninth Circuit said:

> "Thereafter the burden was on the Company and the Union to prove that they made good faith efforts to accommodate Burns' religious beliefs, that the efforts were unsuccessful, and that they were unable reasonably to accommodate those beliefs without undue hardship. (42 U.S.C. 2000e(j)); *Anderson v. General Dynamics Convair Aerospace Division, supra.*" 589 F.2d at 405.

The Ninth Circuit's holding that the IAM owed a duty to attempt accommodation is consistent throughout its opinion, and consistent with its sister circuit courts as readily acknowledged:

[2] Fifth Circuit:

> "[A]ll reasonable accommodations of Appellant's religious beliefs, including one which permits their nonpayment of union dues or the equivalent while continuing regular work assignments with their employer, is mandated by the sweep of 701(j)". *Cooper v. General Dynamics* 533 F.2d 163, 170 (CA 5, 1976); hearing and rehearing en banc

den'd 537 F.2d 1143; cert. den'd. sub nom. *International Association of Machinists v. Hopkins* 433 U.S. 908 (1977).

Sixth Circuit:

> "The burden is on *Essex* and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the employee's religious belief without undue hardship." *McDaniel v. Essex International, Inc.* 571 F.2d 338, 343 (CA 6, 1978).

Seventh Circuit:

> "[O]nce the Plaintiff here had established that his practice . . . was 'religious' . . ., the burden shifted to the employer to demonstrate that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." *Redmond v. GAF Corp.* 574 F.2d 897, 901 (CA 7, 1978).

The IAM's argument that the law is uncertain and leaves it on unchartered waters begs the question and burks the issue. The argument would be germane, at least in part, had the IAM attempted any accommodation to Anderson, which it did not. The IAM stipulated that it offered no accommodation or alternative to Anderson, and informed Anderson that he had to join the union or be fired. The district court adopted and approved this finding in its Opinion (Pet. A-3) and the Ninth Circuit correctly based its opinion on the stipulations and findings (Pet. B-3). Instead, Anderson was left to steer a course between Scylla and Charybdis, followed his individual conscience and was consequently discharged.

B.

Congressional Priority

Next, the IAM argued that charity-substitution cases present

an important and reoccurring problem of nationwide significance. This issue is discussed more fully in sub-paragraph "C", herein, addressing this Court's treatment of 701(j). The action of Congress, labor leaders, and various states is set forth more fully in "II" herein. However, one point needs to be recognized before discussing union security vis-a-vis charity-substitution.

Section 7 of the National Labor Relations Act (29 U.S.C. 157) is the cornerstone of the majoritarian rights of employees to act collectively. Section 8(a)(3) of the NLRA (29 U.S.C. 158(a)(3)) prohibits discrimination against an employee in regard to hire or tenure of employment. This prohibition runs a true course through the other provisions of the NLRA to protect individual employees except for the proviso to 8(a)(3) which carves out an exception for union security. Without the proviso to 8(a)(3) a union security provision in a collective bargaining agreement would, on its face, violate 8(a)(1) by interferring with, restraining, or coercing employees; would violate Section 8(a)(2) prohibiting an employer from "contributing financial or other support" to a union; and would violate 8(a)(3) because it is discrimination in regard to "tenure of employment".[2]

[2] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).*" (Emphasis Supplied)

"Sec. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided,

Thus, the union shop agreement sought and obtained by the IAM is reduced to the dignity of a contractual provision allowed by a proviso to an otherwise general rule against discrimination.

There exists a license to discriminate. Without the proviso to 8(a)(3), the IAM would be restraining and coercing employees in violation of 8(b)(1)(a), and would be causing an employer to discriminate in violation of 8(b)(2).[3]

This license to discriminate was granted to the union movement when it was a fledgling cause in our nation's history. It became Congressional policy to protect the nascent labor movement, to promote the free flow of commerce, and, hopefully, to avoid strife between employer and employee. It

Footnote 2 continued

That subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire of tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in Section 9(3) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement * * * "

[3] 8(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 * * * "

(2) to cause or attempt to cause an employee to discriminate against an employee in violation of subsection (a)(3) * * * "

became apparent in the 1940's and 50's that the labor movement had come of age, and the Congressional policy moved toward fostering collective bargaining. Legislation in the past 20 years has shown Congressional concern for a "bill of rights" to union members, and to a work force faced with the sacrifice of individual rights because of one's . . . religion. The majoritarian rights have now given way to individual rights to have an equal opportunity in the work force. It is now the highest priority of Congress that employees be free from discrimination in the arena of employment. The Supreme Court has again and again reaffirmed this Congressional policy in the 1970's. In *Alexander v. Gardner-Denver* 415 U.S. 36, 39 (1974) the court remarked:

> "[10, 11] We are unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike, *Masto Plastics Corp. v. NLRB* 350 U.S. 270, 100 L.Ed. 309, 76 Sup. Ct. 349 (1956); *Boys Market v. Retail Clerk's Union* 398 U.S. 235, 26 L.Ed. 2d 199, 90 Sup. Ct. 1953 (1970). These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as a collective-bargaining agent to obtain economic benefits for unit members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII."

The Supreme Court recently reaffirmed this policy in *Franks*

v. Bowman Transportation Company 424 U.S. 747 (1976).

It was against this background of the license that the Ninth Circuit decided a private contract between private parties to discriminate will not be exalted above the express statutory commands against discrimination. Admittedly, the courts have held against an individual employee when their Free Exercise rights were balanced against the union security clauses prior to the passage of 701(j). Congress placed a balance into their new legislation which provided the right of individual freedom qualified by undue hardship. What employees had been seeking under the First Amendment sanctions was a complete exemption from union security regardless of its impact, financial or otherwise, on the unions. Congress weighed and balanced the considerations previously sanctioning union security, and gave to the employees their right of religious freedom in the employment sector if such freedom did not cause undue hardship to others. The requirement to accommodate by unions is a qualified right given to employees under Title VII; the First Amendment protection is an absolute right which was sought unequivocally with the unions. Congress further evidenced its attitude over equal employment by amending the National Labor Relations Act to grant absolute right to employees in the health care industry.[4]

C.

Requirement of Attempted Accommodation

Finally the IAM argues that the instant case conflicts with the

[4] 29 U.S.C. 169. Contrary to the position of the IAM, the Respondent contends that Section 19 grants additional coverage than that afforded under Title VII. This additional coverage indicates not only a new Congressional attitude, but also solidifies that "charity-substitution" is a reasonable form of accommodation under 701(j). Cf. Judge Gee, for the majority, 533 F2d at 170.

principles of *Hardison. Hardison,* supports, rather than undermines *Anderson. Hardison* stands, at least, for the proposition that an attempted accommodation is required. *Hardison* involved a defense that the company and union had taken adequate steps to accommodate the employee's religious beliefs, and to construe the statute to require further efforts of accommodation would constitute undue hardship, *supra,* at 432 U.S. 77. At Hardison's request, he bid for a job in Building 2 where he could work the day shift. While he had sufficient seniority under the applicable collective bargaining agreement to avoid work on Saturdays in Building 1, he ranked next to last on the seniority list in Building 2. Hardison's religion forbid him to work on Saturdays. After Hardison's transfer to Building 2, he was asked to work on Saturdays when other employees went on vacation. When he refused, he was fired. The district court found that TWA *attempted* to accommodate Hardison by:

> (1) agreeing with the Union to permit Hardison to swap time off with other employees;
>
> (2) excusing him on religious holidays if he was willing to fill in on the employees' other religious days; and
>
> (3) attempting to find him another job. *Hardison v. Trans World Airlines* 375 F.Supp. 877, 878 (WD Mo., 1974); 432 U.S. at 68-69.

None of these accommodations succeeded. The district court found that further accommodation would have caused TWA undue hardship because TWA only had two remaining choices. One was to let Hardison have his day off and attempt to replace him. The court found this to be extremely difficult. Hardison's job was essential; to replace him would have left another position

vacant; to employ someone not already assigned to Saturday work would have caused eight hours premium pay each Saturday; to have left the position empty would have impaired the supplying of parts for essential airline operations. *Id.* 375 F.Supp. at 889, 891. A second alternative, forcing other employees to trade shifts or jobs would have violated contractual seniority provisions and would have subjected TWA to grievances. *Id.* at 899. "Title VII", the district court said, does not force TWA to impose upon other employees because of one employee's religious beliefs. *Id.* at 891.

The Supreme Court largely adopted the district court's analysis of the facts and its interpretation of the law. The Court agreed with the district court that TWA "had done all that could possibly be expected within the bounds of the seniority system", 432 U.S. 77, "all that it could do . . . without incurring substantial cost or violating the seniority rights of other employees." *Ibid.* at 83, n. 14.

The Court's theme that to accommodate an employee's religious beliefs by discriminating against other employees reflects the court's concern that Title VII be used to create full equality for persons irrespective of religion or belief. In the present case, 701(j) creates equality by allowing an employee whose religion forbids financial support to unions to allocate the same amount that union supporters pay as dues to an equally legitimate, socially desirable, charitable organization. That interpretation ensures that every employee is taxed identically, that each suffers the same loss of income. At the same time, it ensures the employee with strong religious convictions can be true to his faith, but without imposing additional burdens on employees with contrary beliefs. Under *Hardison, Cooper, Yott,*

McDaniel and *Burns,* reasonable accommodation demands such balance of beliefs where the burden on each employee remains the same after accommodation as before.

To hold, as would the Union, that Anderson should sacrifice either his employment or his beliefs when he is prepared to pay the financial burden as other employees, constitutes discrimination and inequality and violation of the statute which provides that "similarly situated employees are not to be treated differently solely because they differ with respect to . . . religion". *Hardison, supra.*

Contrary to the IAM's contention that like TWA, it had satisfied its duty to reasonably accommodate, it has agreed (and the district court and Ninth Circuit have held) that IAM made no attempt to accommodate the religious beliefs of Anderson. To attempt an accommodation was not a Sisyphean effort, as alleged by the IAM, and a reasonable accommodation was available.

II. ***A reasonable accommodation was not impossible as a matter of law, and the IAM could have, in fact, provided a reasonable accommodation.***

At Page 14 of the Petition the argument appears to be asserted that the charity-substitution sought by Anderson was impossible because it would create a "free rider" and drain the union coffers. Succinctly, the circuit court said:

> "[N]either the union nor the employer offered any evidence to prove that the union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the union. It relied simply upon general sentiment against free riders." 589 F.2d at 402.

A.

AFL-CIO Policy

At Page 13, the IAM says that the loss of Anderson's dues threatens its very existence. First, it must be remembered that the union operated for many years without Anderson's $120.00 per year. In fact, the union operated without approximately 805 of the employees, in Anderson's bargaining unit alone, contributing dues from 1959 to 1972. Second, it must be noted that the union donated annually to charity the amount of 36¢ per member (Pet. A-9, n. 14). There were approximately 16,000 members of the union during the relevant times from whose dues the union deferred around collective bargaining directly to charity. With the union donating 36¢ per year for each member, a total annual charitable contribution was made of $5,760. Figuring $120.00 per employee per year for dues, the union could have 48 employees paying directly to a charity, in lieu of pooling the monies, before suffering financial loss of one cent.

Probably the best summarization of the union's contention of loss of dues is set forth in *Burns:*

> "The concern that quantities of religious objectors would deplete the financial resources of the union is not shared by George Meany, President of the AFL-CIO. A letter from George Meany was introduced into evidence in which Mr. Meany expressed his opinion that religious views such as those of Burns should be accommodated to respect individual religious reservations in the administration of union security agreements, and suggested that an appropriate method of accommodation would be the payment of the equivalent of dues to a union charitable fund or to an agreed upon charity." 589 F.2d at 407, n. 2.[5]

[5] The full content of the letter, in relevant part, is as follows:

". . . In other cases religious objectors have not participated at all in union enterprises, *but have paid the equivalent of dues to a union charitable fund or to an agreed upon charity* . . .

In any event, I believe the unions, and employers too should accommodate themselves to genuine individual religious scruples, and I am sure that all of our unions will take that view too. [I intend accordingly to propose to the AFL-CIO Executive Council that it should adopt a strong policy statement to that effect.]; and that the International Unions affiliated with the AFL-CIO undertake to insure that their local unions scrupulously respect individual religious reservations in the administration of union security arrangements." (Emphasis Supplied) (George Meany's letter to the Honorable Frank Thompson, Jr., Chairman, Special Subcommittee on Labor of the House Committee on Education and Labor, dated May 28, 1965, at pg. 2).

B.

Congressional Action

As further evidence of the AFL-CIO's expertise and maturity in the area, it recently supported a "conscience clause" amendment in both houses of Congress. A charity-substitution arrangement, identical to that sought by Anderson, was supported by the AFL-CIO and became a part of the Labor Law Reform Act. Although the Labor Law Reform Act ultimately did not become law, it is indicative of the AFL-CIO's support on this point. No less an advocate for the union than Representative Frank Thompson, joined hands with other House leaders to secure House approval for charity-substitution. The Congressional Record of November 1, 1977, H-11901-H11907 and H-11967-H11968, sets forth the Congressional debate with special mention made of *Anderson* at Page 11903. This Congressional history is an illustration that charity-substitution is an appropriate response to the accommodation/hardship standard.

Congress did pass into law a recent provision providing that an employee of a health care institution who holds a religious belief against joining or paying money to a union, cannot be required to join or support a labor organization as a condition of continued employment. In order to deal with any potential "free rider" problems, Congress provided that such employee would pay the equivalent of dues and initiation fees to a charity recognized

by the Internal Revenue Code. The first question one might ask in looking at the legislative history of the Hospital Amendment was why they needed charity-substitution spelled out if it had been coVered by 701(j) as contended by Anderson. The answer is that the Hospital Amendment gave extended protection to the employee which would not vanish if undue hardship was proven. In other words, accommodation is a right qualified by undue hardship to an individual's religious beliefs. Exemption is an absolute right with no qualification as to undue hardship. *Ibid.* 29 U.S.C. 169.

C.

State Laws

The feasibility of charity-substitution is evidenced by the statutes of Washington, Oregon, Alaska, and Montana enacting the exact accommodation sought by Anderson.[6] Those states say charity-substitution is working elsewhere in the field of public employment, and are consistent with the United States Congress legislation in the area of hospital care.

The foregoing could be concisely reduced to the thought that the union didn't provide accommodation to Anderson because they didn't try to. With no attempted accommodation at all, the Ninth Circuit correctly held that they had failed their burden under 701(j).

[6] Revised Code of Washington, 41.56.122; Civil Statute, 243-666 of the State of Oregon; A.S. 23.40.225; Civil Statute, 59-1603 of the State of Montana.

III. *Section 701(j) provides a secular purpose, does not primarily effect religion, and does not entangle government with religion.*

A.

The IAM had not properly preserved its attack on the constitutionality of 701(j).

The circuit court below declined to reach the constitutional question because the IAM had only obliquely preserved it for appeal. 589 F.2d at 402, n.5. Moreover, the IAM failed to give the proper notice at the circuit court level as required by Federal Rule of Appellate Procedure 44, nor sought compliance with the provisions of 28 U.S.C. ¶ 2403. Under the circumstances, this Court does not properly have the constitutional issue before it and should not address the merits.

B.

The duty to accommodate does not violate the Establishment Clause of the First Amendment.

Without prejudice to the foregoing, and solely as a response to the Petition, Anderson maintains that the Congressionally imposed duty to accommodate does not violate the Establishment Clause to the First Amendment.

(1)

This Court has long held through stare decisis that an Act of Congress should not be held unconstitutional if any other possible construction remains available. This Court most recently reaffirmed this policy in *NLRB v. Catholic Bishop of Chicago* ____ U.S. ____, (1979), where Chief Justice Burger writing for the majority said:

> "Although the respondent pressed their claims under the Religion Clause, the question we consider first is whether

> Congress intended the Board to have jurisdiction over teachers in church-operated schools. In a number of cases the Court has heeded the essence of Chief Justice Marshall's admonition in *The Charming Betcy*, 2 Cranch (6 U.S.) 64, 118 (1804), by holding that an Act of Congress ought not be construed to violate the constitution if any other possible construction remains available. Moreover, the Court has followed this policy in the interpretation *of the Act now before us and related statutes.*" (Emphasis Supplied) 59 L.Ed.2d 533, 541 (1979).

The writer would respectfully take issue with the Petitioner, at Page 22-24, that *Catholic Bishop of Chicago* controls the instant case. Clearly, from the above passage, the court never reached the constitutional question; but instead held that the NLRB did not have jurisdiction leaving any other determination unnecessary.

The court's policy of avoiding constitutional attacks has been consistently evidenced with specific dealings of the National Labor Relations Act itself. In fact, the constitutionality of the NLRA owes its survival to just such a policy. It may be remembered that at the time of passage of the NLRA most constitutional observers doubted the constitutionality of Congress to legislate over employer and employee relations governing manufacturing. The Fifth Circuit had found the NLRA unconstitutional on just such grounds (83 F.2d 998), and only by a 5-4 vote did the fledgling Act survive judicial scrutiny two years later. Chief Justice Hughes, who wrote the majority opinion, said, "the cardinal rule of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which could be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." (citations omitted) *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937).

A constitutional challenge was put squarely between the Free Exercise Clause of the First Amendment and the Congressional authorization of union security in *IAM v. Street* 367 U.S. 740 (1961).[7] Avoiding the constitutional issue in *Street*, the court stated the rule:

> "Federal Statutes are to be construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of Congress is drawn in question, and even if serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (Citation Omitted) 367 U.S. at 749.

The viability of this cardinal principle is evidenced by the earlier quote from *Catholic Bishop of Chicago, supra* at 541.

(2)

Should this Court find need to consider the Petitioner's attack on the Constitution, Congressional action underlying 701(j) will pass Establishment Clause concern. At every juncture of this long and winding trail of litigation, the IAM has erected new walls for Anderson to clear and gain his rightful place by reinstatement. Now, the IAM submits that 701(j) is a violation of the fundamental constitutional concepts upon which this country was founded, and that this Court should declare it unconstitutional. Anderson's sincerely held religious beliefs, based on over 75 years of instruction by his Church, are simply beliefs based on

[7] *Street* arose in a context of union security under the 2 § Eleventh of the Railway Labor Act which passed in 1951. A review of the legislative history of the 1951 Amendment shows it was patterned after 8(a)(3) of the National Labor Relations Act which was amended under Taft-Hartley in 1947. The courts have consistently held under both Acts, that only "financial core" membership is authorized and, thus, avoided the constitutional question. Accord, *Abood v. Detroit Board of Education*, 431 U.S. 209, 217, n. 10 (1977); *NLRB v. Hershey Food Corp.*, 513 F2d 1083 (CA 9, 1975); *Railway Employees Department v. Hanson*, 351 U.S. 225, 238 (1956); *Marden v. IAM*, 576 F2d 576 (CA 5, 1978).

general distrust for the union says the IAM. It is too complicated to determine good faith, or it unduly harms the majority says the IAM. Let us not be overburdened by efforts to allow Anderson to earn a living without violating his religious beliefs they say. Accommodation under the First Amendment is the background between the free exercise and establishment drafted by our founding fathers.

It is a historical fact that the American political experience has been deeply ingrained with the concept of religious freedom in our society from the time of the first colonies. Indeed, experience in England and some of the colonies, convinced the drafters of the Bill of Rights that the government should assure that an American could follow the dictates of his religious beliefs and the secular economic world.

Likewise, the drafters of the Bill of Rights were justifiably concerned about the existence of a religious state. Based on that concern, Thomas Jefferson said that the First Amendment built a wall of separation between church and state. *Everson v. Board of Education* 330 U.S. 1 (1947). Easier said than separated has been the lesson acknowledged by the courts in this sensitive area of constitutional law. Chief Justice Burger, writing for the majority, said that "the line of separation, far from being a 'wall', is a blurred, indistricted, and invariable barrier depending on all the circumstances of a particular relationship". *Lemon v. Kurtzman* 403 U.S. 602, 614 (1971).

Two touchstones should trigger the judicial analysis of 701(j) and the First Amendment. First, prior Supreme Court decisions have charted their way through difficult areas of aid to secular and sectarian schools, conscientious objectors to war based on religious beliefs and *raison d'etre,* and tax benefits to churches

and secular eleemosynary institutions. A reality of these decisions is that separation is not an absolute:

> "Our prior holdings do not call for total separation between church and state; actual separation is not possible in an absolute sense; some relationship between government and religious organizations is inevitable." (Citations Omitted) *Lemon,* supra, at 614.

Second, the Supreme Court has announced several litmus "guidelines" which can be summarized: (1) the statute must have a secular legislative purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) the statute and its administration must avoid excessive government entanglement with religion. *Meek v. Pittenger* 421 U.S. 349, 358 (1975); *Committee for Public Education v. Nyquist* 413 U.S. 756, 772-773 (1973); *Lemon, supra,* at 612-613; *Tilton v. Richardson* 403 U.S. 672-678 (1971); *Walz v. Tax Commission* 397 U.S. 664, 674 (1970).

Admittedly, a Congressional enactment must pass all three guidelines. *Nyquist* 413 U.S. at 774.[8] Here, as other courts have found, the statutory requirement of reasonable accommodation without undue hardship passes muster under all established criteria.

(A)

The passage of 701(j) had a secular purpose to prevent employment discrimination.

The least difficult callipering of the guidelines the Court has set forth is the question of secular purpose. The reasonable accommodation requirement, like the statutory scheme of Title

[8] See explanatory note 413 U.S. 773, n. 31, citing Chief Justice Burger's overview in *Tilton, supra.* Although state action is not a concern in the instant case, the same caveat applies.

VII as a whole, was intended to prevent discrimination in employment. Just as the Supreme Court announced a business necessity to prevent citizens from denial of employment, in 701(j) Congress spelled out a business accommodation test that was qualified by a showing of undue hardship. Although the lower courts have not clearly articulated the equivalency of business necessity with reasonable accommodation, it is certain that the defense of undue hardship does not create a greater burden.[9]

The duty to accommodate, as expressed in 701(j), states the secular legislative purpose guaranteeing an employee that his ability to earn a living will not be impaired because of his religious beliefs. This is consistent both with the prologue to the Civil Rights Act of 1964, and the prologue set forth in the Amendments to the Civil Rights Act in 1972. The thought of impairing a worker's right to earn a livelihood because of his religious beliefs would have caused Thomas Jefferson and James Madison, themselves, to do a little masonry work on the wall. Consistently, Senator Randolph, Senate sponsor of 701(j), indicated, "[I]t is my desire and hope the desire of my colleagues to assure that freedom from religious discrimination in the employment of workers is for all times guaranteed by law... The term 'religion' as used in the Civil Rights Act of 1964 encompassed, as I understand it, the same concepts as are included in the First Amendment — not merely belief, but also conduct; the freedom to believe, and also the freedom to act." Legislative History of the Equal Employment Opportunity Act of 1972, Senate Subcommittee on Labor, Reprint Page 712-713.

To satisfy the argument of the IAM at Page 21 of their Petition, the Congress would have to examine every act it passed

[9] *Yott, supra,* 501 F2d at 402, n. 6.

to be sure that some religious body did not gain some benefit thereby.[10] If valid secular purposes are destroyed by benefit to some religious bodies, then the conscientious objector statutes have curiously withheld constitutional scrutiny. Certainly when an individual whose religious training and beliefs require his claim of conscientious objector, he benefits in comparison to the majority who must serve a more direct confrontation with the enemy. *Clay v. United States* 403 U.S. 698 (1971). Likewise, an individual whose religious beliefs teach against financial association with unions may also take benefit of a statutory scheme of reasonable accommodation without pulling bricks out of the wall of separation. Just as an army staffed by conscientious objectors would be of questionable viability, a work force free of discrimination would be difficult to achieve if we exclude, by discharge, sincere religious believers. Although one court has pointed out that no law requires an employee to work for his employer, that argument must presume some ability to control his beliefs regarding his divine being. Surely, Anderson's life would have been a lot simpler if divine intercession worked in reverse. If a federal statute is the source of the authority by which any private rights are lost or sacrificed, then a federal statute may constitutionally purge the work place of religious discrimination by which private rights may incidentally benefit.

(B)

The primary effect of 701(j) was to eradicate religious discrimination in the work place.

A more difficult area, at least in relation to secular purpose, has been the court's determination of primary effect. The court's

[10] In the writer's home state, a religious sect has settled a Western part of the state due to their beliefs in agriculture. Surely Congress can pass legislation that benefits the agrarian economy generally without concern that this religious sect will derive impermissibly immediate benefit.

writings on this second touchstone appear blended with its concern that the government make no law *respecting* an establishment of religion. *Lemon, supra,* at 612.

An understanding of the Court's holdings and interpretations begins with an understanding of what "principle or primary effect" does not include. The crucial question is not whether some benefit accompanies itself to a religious body as a result of legislation, but whether the primary legislative intent advances that religion. The Court has noted several cases in the aid of sectarian school areas where the alleged Constitutional violation has been upheld, even though admittedly, some benefits resulted to the religious institution. *Tilton v. Richardson* 403 U.S. 672, 679 (1971). Earlier, the court made cogent note that granting tax exemptions to churches necessarily operates to afford an indirect economic benefit, but upheld state taxes granting property exemption to churches over the argument of primary effect. *Walz v. Tax Commission* 397 U.S. 664, 674-675 (1970). Finally, the court has recently attempted to draw the line on primary effect, but has embraced its prior positions that incidental effect resulting to a religious institution does not infringe on the Establishment Clause. *Nyquist, supra,* at 775-776. Cf. 413 U.S. at 783, n. 39.

The Court has noted, and distinguished when appropriate, the primary effect to individuals versus religious institutions. Upholding a New York statute authorizing the loan of secular text books to parochial students, the court appreciated that a financial benefit was awarded to parents and children, not to schools. *Board of Education v. Allen* 392 U.S. 236, 243-244 (1968). While free books might make it more likely that a child would attend a sectarian school, this would only be an incidental

benefit which did not encroach into the prohibited zone. *Allen* relied on an even more profound example of spending tax raised funds to pay bus fares for New Jersey students attending parochial schools. Obviously, acknowledged the court, some students might not even be able to go to sectarian schools if the parents were compelled to pay bus fares out of their own pockets. *Everson, supra,* 330 U.S. at 17. Admitting the legislatively secular benefit to the sectarian sector, the court held that bus fares to individuals did not foster religion within the First Amendment confines and restrictions.

Under Anderson's proposed form of accommodation, he would receive no pecuniary benefit, incidental or otherwise. He pays the same amount of money to an equally socially desirable, non-religious, institution (charity). He pays the same amount of dollars as other similarly situated employees. He has no residual benefit which accommodates him in dollars which then, in turn, can be used to promote his religious beliefs. The IAM, as already demonstrated, makes payments from its general fund to charity far in excess of Anderson's per year proposed subscription. Neither Anderson's Church, nor any other religious body, receives any primary benefit as that term is normally used or has been defined by the Supreme Court.

Section 701(j) is available to all members of all religious bodies whose beliefs conflict in the arena of the work place. Of course, the exercise of those beliefs is qualified by the standard of undue hardship. Thus, 701(j) does not primarily benefit one religion over the other, or religion over sectarian, within the statutory scheme to avoid religious discrimination. This point is easily gleaned from the legislative intent by a conversation between Senators Dominick and Randolph:

> Mr. Dominick. "I have listened very carefully to the Senator's presentation, and was impressed by it. Could the Senator tell me, whether this Amendment would also effect, for example, the Amish or some other religious sect who has a different method of conducting their lives than do most Americans."
>
> Mr. Randolph. "Yes; I envision that it would." Legislative History at 713.

On the other hand, 701(j) does not benefit religious beliefs as opposed to non-believers of religion. *Young v. Southwestern Savings and Loan* 509 F.2d 140 (CA 5, 1975).

Does primary benefit result to the religious if another employee travels to the beat of a different drum purely because of secular beliefs against forced association with, or contributions to, a union? The secular belief would certainly fall outside the scope of the statutory scheme of 701(j) while a similar religious belief would be protected. That consequence does not, however, result in a primary benefit to the religion, or worshiper himself, for that matter. Congress may permissively legislate an accommodation, as it may for a tax exemption, without inviting benefits to a religious body to a degree which would result in unconstitutionality. That degree, or failsafe device, is also part of the statutory scheme. Although the First Amendment Religion Clause did not compel Congress to pass 701(j), the First Amendment is not violative by a statutory scheme which grants accommodation without undue hardship to persons with those religious beliefs. In a free exercise case, the court recognized that an employee was available for work, except as prohibited by her religious beliefs. The court said in its holding that a Seventh-Day Adventist was entitled to unemployment compensation, but that its decision neither (1) served to abridge other persons' religious beliefs; nor (2) prevent a statutory scheme that protected secular,

as well as, religious beliefs. *Sherbert v. Verner* 374 U.S. 398, 409-410 (1963). The degree of primary effect, measured by the calliper of the conscientious objector statutes, is no greater than the scheme of objection based on religious training and belief. *U.S. v. Seeger* 380 U.S. 163, 173 (1965).

(C)

Accommodation does not impermissibly entangle government and religion.

The IAM alleges, at Pages 21-22, the excessive government entanglement if the EEOC or courts are required to enforce reasonable accommodation. This argument is not well taken based on the Supreme Court's prior determination of similar issues. The review, and implementation thereof, does not approach the criteria found impermissible in *Lemon, supra,* or the 20-year provision in *Tilton, supra.*

A proper starting point for the analysis is the language in *Walz* 397 U.S. at 675:

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continual surveillance leading to an impermissible degree of entanglement" . . . "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state."

701(j), here, allows an employee to abstain from financial support of the union, and pay the equivalent to a neutral, non-religious, and non-union charity. Questions may of course arise regarding other forms of accommodation. What if the employee wants to simply keep the money for his own "in-house" religion? What about determining the sincerity of his religious beliefs about paying to a charity? Those considerations are not present

in the instant case and need not be reached for determination. The parties agreed, the district court found, the Ninth Circuit approved, and the IAM admits that Anderson is sincere in his religious belief that joining or contributing to a labor union violates his religious beliefs (Pet. Pg. 5). However, to meet the argument, we must note that the developed case law dictates that it is the claimant's burden to show his beliefs are religiously based. *Seeger* places definition to the permissible scope of examination into religious beliefs, but does not shift the burden from the employee to first make a showing. This resolution does not require a convention of theologians; but only a secular determination that the beliefs are sincerely held, and in their scheme of things are religious. The writer suggests that this fact finding is not as subjective, or difficult, as good faith bargaining under the NLRA. Neither is it as subjective, or difficult, as showing discriminatory effect based upon statistical disparity. In fact, a review of all the litigation under 701(j) shows a non-existence of problems on the "sincerely-held religious beliefs" issue. As Justice Holmes commented, "A page of history is worth a volume of logic". *New York Trust Company v. Eisner* 256 U.S. 345, 349 (1921).

The instant resolution is certainly a more broad channel than the narrow width referred to in conscientious objector cases. The Supreme Court has consistently approved the statutory scheme of conscientious objectors which requires an administrative inquiry directly into proposition two, i.e., opposition based on religious training and beliefs. Nor does 701(j) require constant surveillance of the division of dollars for secular versus sectarian purposes. The inquiry is not as difficult, at least certainly not more than, the determination if a purported church qualifies for a property tax exemption. As

stated earlier, *Catholic Bishop of Chicago,* does nothing to help us resolve the instant case. The court never reached any constitutional consideration, *supra,* 59 L.Ed.2d at 541, 546.

Of the two district courts to hold 701(j) unconstitutional, Judge Real did not specifically address the entanglement problem. *Yott v. North American Rockwell* 428 F.Supp. 763 (CD Cal., 1977) on remand.[11] Judge Cohill in *Gavin .v Peoples Natural Gas Company* ___ F.Supp. ___, 19 EPD 9033, (WD Penn., 1979) was absolute in approach and avoiding in resolution. These analyses by the district courts cannot be squared with the Supreme Court which has repeatedly found no Establishment Clause problem in exempting religious observers from state-imposed duties, even when the exemption was in no way compelled by the free exercise provision. *Wisconsin v. Yoder* 406 U.S. 205, 234-235, n. 22 (1972); *Sherbert, supra,* 374 U.S. at 409; *Zorach v. Clauson* 343 U.S. 306 (1952).

Lastly, Congress itself considered constitutional proportions of 701(j) before implementing an effort to eradicate religious discrimination.

> Senator Williams (Chairman). "As I read the First Amendment of the Constitution, there is no problem here presented by the Amendment in connection with the first clause:
>
> > 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'
>
> In dealing with the free exercise thereof, really, this promotes the constitutional demand in that regard.
>
> I certainly agree with the objective of the Amendment."

[11] Cf. *Scott v. Southern California Gas Company,* 8 EPD 9450 (CD Cal., 1973).

IV. ***Other reasons against granting certiorari.***

The Ninth Circuit correctly decided the case below.

The IAM attempts to distinguish the denial of certiorari in the companion case of *Burns;* and an almost identical case involving the same parties, *Cooper v. General Dynamics.* The decisions in *Cooper* and in *Burns* both turned on the issue that the defendants failed to satisfy their burden of proof because they attempted no accommodation. In *Anderson, Burns,* and *Cooper,* the union took an implacable position that it was neither required, nor agreeable, to working with the employee in any way. Neither the IAM in *Anderson* or *Cooper,* or the UTU in *Burns,* made any attempt to accommodate the employees' religious beliefs. These cases, and the actions of the Union, were identical in recital and performance. It is fair to assume that when the Court denied certiorari in *Cooper,* after its decision in *Hardison,* that it was satisfied that both cases read together present a correct interpretation of 701(j) and 8(a)(3). Similarly, when the Court denied certiorari in *Burns,* it did not care to disturb the Ninth Circuit's holding. Simply stated, there are neither issues nor arguments in *Anderson,* which have not already been rejected by the Supreme Court for consideration by certiorari.

CONCLUSION

The Union attempted no accommodation at all to the religious beliefs of David Anderson. The IAM did not carry its burden of proof, and wholly failed to demonstrate any undue hardship. The Courts have consistently held that it is the Union's burden to accommodate or show that undue hardship would exist by any form of reasonable accommodation.

The courts for the Fifth, Sixth, Seventh, and Ninth Circuits are in complete agreement that under Title VII there exists a duty to accommodate without undue hardship. The Supreme Court of the United States says there exists a duty for the Union to accommodate short of incurring undue hardship. It is implicit in its conclusion that accommodation is owed, and that 701(j) reaches and complements 8(a)(3) as a pronouncement of today's National Labor Policy. The IAM failed to carry its burden of proof that a reasonable accommodation to Anderson's religious beliefs would constitute undue hardship.

The Court has previously denied certiorari in the almost identical case of *Cooper* and *Burns*. There are neither issues nor contentions to distinguish *Anderson* for consideration of the granting of certiorari in this case.

For the above reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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